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NO. 83-1403

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STEPHEN M. KARLOVICH
AND TAMMY R. HARMS,
Petitioners,

v.

STATE OF GEORGIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTIONS PRESENTED

1.

Whether the Court of Appeals of Georgia properly concluded that Petitioner Karlovich did not have standing to challenge the search and seizure as he did not have a reasonable expectation of privacy in the field?

2.

Whether the Court of Appals of Georgia properly concluded that Petitioner Harms did not have standing to challenge the search and seizure as she did not have a reasonable expectation of privacy in the field?

TABLE OF CONTENTS

	Page(s)
QUESTIONS PRESENTED.	i
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS.	4
REASONS FOR NOT GRANTING THE WRIT.	10
A. THE TRIAL COURT AND THE COURT OF APPEALS OF GEORGIA PROPERLY CONCLUDED THAT, UNDER THE FACTS OF THIS CASE, PETITIONER KARLOVICH LACKED STANDING TO CHALLENGE THE SEARCH AND SEIZURE AS HE HAD NO REASONABLE EXPECTATION OF PRIVACY IN THE AREA WHERE THE MARIJUANA WAS DISCOVERED.	10
B. THE TRIAL COURT AND THE COURT OF APPEALS OF GEORGIA PROPERLY CONCLUDED THAT, UNDER THE FACTS OF THIS CASE, PETITIONER HARMS LACKED STANDING TO CHALLENGE THE SEARCH AND SEIZURE AS SHE HAD NO REASONABLE EXPECTATION OF PRIVACY IN THE AREA WHERE THE MARIJUANA WAS DISCOVERED.	17

CONCLUSION. 36

CERTIFICATE OF SERVICE. 38

TABLE OF AUTHORITIES

Page(s)

Florida v. Brady, ___ U.S. ___, 102 S.Ct. 2266 (1982) . . 27

Hester v. United States, 265 U.S. 57 (1923) 11, 18, 19, 23, 35

Karlovich v. State, Harms v. State, 165 Ga. App. 761, 302 S.E.2d 396 (1983) 3, 9

Karlovich, et al. v. State, 251 Ga. 698, ___S.E.2d ___ (1983) 3

Katz v. United States, 389 U.S. 347 (1967). . . . . Passim

Maine v. Thornton, ___ U.S. ___ 103 S.Ct. 1520 (1983). . . 29

Oliver v. United States, ___ U.S. ___, 103 S.Ct. 812 (1983) 31

Rakus v. Illinois, 439 U.S. 128 (1978) 14, 26, 35

Rawlings v. Kentucky, 448 U.S. 97 (1980) 13, 20

State v. Brady, 379 So.2d 1294 (Fla. App. 1980). 27

State v. Brady, 406 So.2d 1093 (Fla. 1981) 28

State v. Thornton, 453 A2d 489 (Me. 1982). 31

United States v. Oliver, 657 F.2d 85 (6th Cir. 1981) . . . 32

United States v. Oliver, 686 F.2d 356 (6th Cir. 1982) (en banc).33

United States v. Salvucci, 448 U.S. 83 (1980). 12, 20, 21

United States v. Williams, 581 F.2d 451 (5th Cir. 1978). . . 25

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PART ONE

STATEMENT OF THE CASE

Petitioners, Steven M. Karlovich and Tammy R. Harms, were indicted and

tried in the Superior Court of Upson County, Georgia. The Petitioners were indicted for the possession of more than one ounce of marijuana with intent to distribute in violation of the Georgia Controlled Substances Act. Prior to trial, a motion to suppress was filed and a hearing was conducted on that motion. After considering the evidence, the trial court denied the motion to suppress. The Petitioners were convicted at a bench trial and sentenced to serve three years imprisonment.

The Petitioners subsequently filed an appeal to the Court of Appeals of Georgia challenging their convictions in the instant case. On appeal, that court addressed the one issue concerning the denial of the motion to

suppress. The court affirmed the trial court's decision as to the motion to suppress. Karlovich v. State, Harms v. State, 165 Ga. App. 761, 302 S.E.2d 396 (1983). The Supreme Court of Georgia granted certiorari on June 8, 1983. On November 30, 1983, the Supreme Court of Georgia found that the case did not satisfy the criteria for the granting of a writ of certiorari and the writ was vacated. Karlovich, et al. v. State, 251 Ga. 698, ___ S.E.2d ___ (1983). The instant petition was then filed in this Court.

STATEMENT OF THE FACTS

In 1979, Thomas LoGuidice purchased a three hundred and forty-five acre tract of rolling, densely wooded land in rural Upson County, Georgia, about eight miles east of the City of Thomaston. In the summer of 1980, Upson County Sheriff Merrill Greathouse received reports that machinery had been heard operating at night on the LoGuidice property. An unidentified source told the sheriff in the fall of that year that LoGuidice had hired a local contractor to dig a well on the land, and had directed the contractor to lay waterpipe from the well to a distance into the woods. Prior to completion of the job, LoGuidice discharged the

contractor and told him that he would finish the job himself.

Sometime in the fall of 1980 the sheriff entered the property for the purpose of searching for marijuana. At that time he was unable to locate any marijuana growing on the property. Later that fall the sheriff conducted an aerial search of the property but could only see the construction of a new fence by LoGuidice around his property. The sheriff had ascertained that the property belonged to LoGuidice through a check of the county property tax records.

On July 6, 1981, acting on information from an unidentified source, the sheriff and a group of G.B.I. agents entered the property to

search for marijuana. After crossing a barbedwire fence and following an old logging road, they discovered an enclosed one-half acre plot of marijuana growing about thirty-five feet from a small travel trailer in which Tammy Harms, LoGuidice's sister-in-law, was living. The trailer belonged to LoGuidice and was connected to the patch of marijuana by a path. The marijuana that was growing in the patch was not visible beyond a distance of ten feet due to a tall chicken wire fence surrounding it. The officers watched the plot for four and one-half to six hours and saw Ms. Harms come onto the enclosure and "fondle" the plants. No arrests were made that day.

On July 7, 1981, the officers returned to the property and arrested Ms. Harms and Steven Karlovich on or near the plot.

The Court of Appeals of Georgia made certain factual findings in addressing the record. The court concluded the following:

> LoGuidice was tried and convicted and filed a separate appeal. See the affirmance of that conviction in LoGuidice v. State, 164 Ga. App. 709, 297 S.E.2d 499 (1983). Karlovich and Harms were jointly tried without a jury and stipulated that all the

facts concerning the merits of their case and the search and seizure issues were the same as appeared in the trial of LoGuidice. Those facts are basically stated above, Karlovich was shown to have no ownership interest in the property and to have lived some distance away from the property. Harms lived in a house trailer only thirty-five feet from the marijuana field in controversy. The facts are undisputed that the field was separated by small

> hills, a thick growth of trees and underbrush and one could see only a portion of the trailer from the wire fence surrounding the field.

Karlovich, supra at 762.

Further facts will be developed as necessary for a more thorough examination of the issues which are presented by this petition.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. THE TRIAL COURT AND THE COURT OF APPEALS OF GEORGIA PROPERLY CONCLUDED THAT, UNDER THE FACTS OF THIS CASE, PETITIONER KARLOVICH LACKED STANDING TO CHALLENGE THE SEARCH AND SEIZURE AS HE HAD NO REASONABLE EXPECTATION OF PRIVACY IN THE AREA WHERE THE MARIJUANA WAS DISCOVERED.

Petitioner Karlovich has urged this Court to grant the instant petition for a writ of certiorari based on the failure of the trial

court to suppress certain evidence. The basis for this request by the Petitioner is an assertion that the decision by this Court in Katz v. United States, 398 U.S. 347 (1967), narrowed the scope of the open fields doctrine set forth in Hester v. United States, 265 U.S. 57 (1923), so as to make the challenged search and seizure illegal.

The Petitioner asserts that he does have the necessary standing to challenge the search and seizure as he had a reasonable expectation of privacy under the decision in Katz, supra, such as to necessitate the procurement of a warrant before a valid search of the area could occur. Petitioner Karlovich further asserts that the Court of Appeals of Georgia

has adopted a per se approach to the open fields doctrine which is incompatible with Katz, supra. The Respondent submits that the Court of Appeals of Georgia was correct in determining that Petitioner Karlovich lacked standing to challenge the search and seizure as Karlovich could not have a reasonable expectation of privacy in the area searched as he had no possessory interest therein. The Respondent further submits that, based on the above, the question of the open fields doctrine does not apply to this Petitioner.

This Court has established the guidelines for determining standing to challenge an alleged illegal search and seizure in the cases of United States v. Salvucci, 448 U.S. 83

(1980), and Rawlings v. Kentucky, 448 U.S. 97 (1980). In those cases, this Court has held that defendants charged with crimes of possession may only claim the benefits of the exclusionary rule if their own Fourth Amendment rights have been violated. The Court went on to hold that legal possession of a seized good is not a proxy for determining whether the owner had a Fourth Amendment interest. While ownership is a factor to be considered in determining whether an individual's Fourth Amendment Rights have been violated, possession of a seized good may not be used as a substitute for a factual finding that the owner had a legitimate expectation of privacy in the area searched.

The holding of this Court in Rakus v. Illinois, 439 U.S. 128 (1978) further shows that Petitioner Karlovich lacks the necessary standing to challenge the search and seizure in the instant case. This Court in Rakus, supra, held that a person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed. Further, this Court also held in Rakus, supra, that while legitimate presence on a searched premises is not irrelevant to one's expectation of privacy, it cannot be deemed controlling in determining the validity of a police search. Thus, while Mr. Karlovich may

have legitimiately been on the land owned by Mr. LoGuidice and resided on by Ms. Harms, his mere presence there cannot give him standing to challenge the search and seizure.

Further, in the instant case, Petitioner Karlovich has made no showing that he owned the property seized or that he owned the land on which the marijuana was being grown. The evidence points to the conclusion that Mr. Karlovich was helping Petitioner Harms and Mr. LoGuidice cultivate and grow the marijuana. Thus, it cannot be said that Petitioner Karlovich had a reasonable expectation of privacy in the area searched and therefore, under the guidelines announced by this Court, he lacks standing to challenge the search

and seizure. Therefore, it is clear, that the question of the open fields doctrine does not apply to this Petitioner. This Petitioner has not shown a possessory interest in the land or the marijuana seized, and as his mere presence on the land is not enough to establish an expectation of privacy, it is thus clear that the Petitioner could not have a reasonable expectation of privacy in the area searched. Therefore, as to this Petitioner, this Court should not grant certiorari as the Petitioner lacks the necessary standing to challenge the search and seizure.

B. THE TRIAL COURT AND THE COURT OF APPEALS OF GEORGIA PROPERLY CONCLUDED THAT, UNDER THE FACTS OF THIS CASE, PETITIONER HARMS LACKED STANDING TO CHALLENGE THE SEARCH AND SEIZURE AS SHE HAD NO REASONABLE EXPECTATION OF PRIVACY IN THE AREA WHERE THE MARIJUANA WAS DISCOVERED.

Petitioner Harms has urged this Court to grant the instant petition for a writ of certiorari based on the failure of the trial court to suppress certain evidence. The basis for this request by the Petitioner is an assertion that the decision by this

Court in Katz v. United States, 389 U.S. 347 (1967), narrowed the scope of the open fields doctrine set forth in Hester v. United States, 265 U.S. 57 (1923), such as to make the challenged search and seizure illegal. The Petitioner asserts that she does have standing to challenge the search and seizure as she had a reasonable expectation of privacy in the area searched such as to necessitate the procurement of a warrant before a valid search of the area could occur. Petitioner Harms asserts that the Court of Appeals of Georgia has adopted a per se approach to the open fields doctrine which is incapatable with Katz, supra.

The Respondent submits that the Court of Appeals of Georgia correctly

determined that Petitioner Harms lacked standing to challenge the search and seizure, as it correctly found she could not have a reasonable expectation of privacy in the area searched as she did not own the land on which the search was carried out. The Respondent further submits that assuming arguendo, the Petitioner's presence on the land operated to give her a possessory interest, the Court of Appeals of Georgia properly applied the decisions in Hester, supra, and Katz, supra, and determined that the area searched was outside the curtilage occupied by Petitioner Harms and thus, she could not have an expectation of privacy in that area.

This Court has established the guidelines for determining standing to

challenge an alleged illegal search and seizure in the case of United States v. Salvucci, 448 U.S. 83 (1980) and Rawlings v. Kentucky, 448 U.S. 97 (1980). In those cases, this Court held that a defendant charged with the crime of possession may only claim the benefits of the exclusionary rule if their own Fourth Amendment rights have been violated. The Court further held that legal possession of a seized good is not a proxy for determining whether the owner had a Fourth Amendment interest. While ownership is a factor to be considered in determining whether an individual's Fourth Amendment rights have been violated, possession of a seized good may not be used as a substitute for a factual finding that the owner had a

legitimate expectation of privacy in the area searched.

The evidence produced at trial and later concluded as fact by the Court of Appeals was that Petitioner Harms was merely residing on Mr. LoGuidice's property and was cultivating the marijuana field on that property. As this Court stated in Salvucci, supra, legal possession of a seized good is not a proxy for determining whether the owner had a Fourth Amendment interest. Petitioner Harms has not shown that she did in fact own the area searched. To the contrary, the evidence presented at trial idicated that the land was owned by Mr. LoGuidice. The only basis for Petitioner Harms claiming any expectation of privacy was that she

resided in the trailer located thirty-five feet from the marijuana field.

The Fourth Amendment provides that "the right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated. . . ." As was stated by this Court in Katz v. United States, 389 U.S. 347 (1967) "the Fourth Amendment protects people, not places . . . ." Thus, it must be noted that the trailer in which Petitioner Harms was residing was in fact owned by Mr. LoGuidice, as was the field in which the marijuana was found. The Petitioner is thus assuming that residency in the trailer would then entitle her to the protection of the Fourth Amendment for

the field located thirty-five feet from that trailer. Assuming, arguendo, that residency in the trailer owned by Mr. LoGuidice would entitle her to Fourth Amendment protection for that trailer, such protection would not extend to the marijuana field located nearby.

In this Court's opinion in Hester v. United States, 265 U.S. 57 (1923), the Court noted that, "The special protection afforded by the Fourth Amendment to the people and their persons, houses, papers and effects, is not extended to the open fields. The distinction between the latter and the house is as old as the common law." Id. at 59. Subsequently, in this Court's decision in Katz v. United States, 389 U.S. 347 (1967),

this Court emphasized that the Fourth Amendment protects people not places. Therefore under Katz there are two requirements that must be met to establish a Fourth Amendment violation. First, a defendant must have exhibited an actual subjective expectation of privacy and secondly, the expectation must be one that society is prepared to recognize as reasonable. Id. at 362.

In a case which construed Katz and the open fields doctrine, the Fifth Circuit Court of Appeals noted that "Although the expectations test has done away with outmoted property concepts no longer satisfactory for Fourth Amendment analysis (cites omitted), a distinction between open fields and curtilage is still helpful

in determining the existence or not of a reasonable privacy expectation." United States v. Williams, 581 F.2d 451, 453 (5th Cir. 1978). The court went on to note that it still would hold that the open fields surrounding a house would not be protected under the Fourth Amendment.

In examining the situation in the instant case in light of a determination as to whether certiorari should be granted, this Court should examine the facts of the case and the applicability of the open fields doctrine to those facts. In the instant case, the trial court as the finder of fact obviously found the facts such that the search and seizure of marijuana should be upheld. The Court of Appeals of Georgia further

concluded that Petitioner Harms lacked the standing to complain of the search and seizure as she could have no reasonable expectation of privacy in the field as it was outside the curtilage of her residence. Thus, the Court of Appeals properly applied the standard announced in Katz, supra, and Rakus, supra in determining whether the Petitioner had standing to complain.

The Petitioner has cited several cases which are now pending before this Court in an effort to establish that she did have a reasonable expectation of privacy in the field. However, these cases are sufficiently distinguishable from the facts in the instant case for this Court to conclude that a granting of certiorari

is not warranted in the present case. As each case must turn on its unique facts, it is necessary to examine the underlying factual circumstances behind each case involved.

This Court has granted certiorari in Florida v. Brady, ___ U.S. ___, 102 S.Ct. 2266 (1982). The factual circumstances in that case involve a forced entry by deputies onto 1800 acres of land which were clearly fenced, locked, occupied and posted. The Florida courts noted that the deputies had to cross a dike, ram through a gate, and cut a chain lock as well as cross several posted fences in order to reach the area in question. See State v. Brady, 379 So.2d 1294 (Fla. App. 1980). The Florida District Court of Appeals

excluded the evidence based on the total encirclement of the property and the "no trespassing" signs that were present. The court concluded that there was clearly an expectation that no one would enter the property.

The Florida Supreme Court also concluded that the search was improper based on the facts of that particular case. The court concluded that there was a clearly demonstrated expectation of privacy and found that under the facts of that case it was reasonable. State v. Brady, 406 So.2d 1093 (Fla. 1981). Therefore, that case presents a circumstance factually distinguishable from the instant case, as Brady exhibited through the numerous fences, gates and signs, a far greater subjective expectation of

privacy than the Petitioner in this case. The Petitioner in the instant case had not taken the same precautions as the defendant in Brady, as the officers stated at the trial of the Petitioner that they were unaware that the property was posted until they were actually leaving the area. Also, it should be noted that the Petitioner in this case is not the actual owner of the land, and there was no evidence presented that this Petitioner took any steps of her own to exclude the public from the area in which she was residing.

This Court has also granted certiorari in Maine v. Thornton, ___ U.S. ___ 103 S.Ct. 1520 (1983). That case involves a similar situation in which officers walked across a

defendant's property between the defendant's mobile home and an adjacent house. The officers followed a road which was being used as a footpath. The marijuana was found growing in a clearing surrounded by chicken wire. It was noted that the area was heavily wooded. The court noted that there had been an old stone wall surrounding the area, as well as an old barbedwire fence and "no trespassing" signs around the perimeter of the property, including the area where the woods road entered the defendant's property. The court based its decision on the fact that this was a secluded location and that there were many efforts made to exclude the public. The court found that these facts evidenced a

reasonable expectation of privacy. State v. Thornton, 453 A2d 489 (Me. 1982). However, in that case, the court granted the motion to suppress and the state requested and was granted a writ of certiorari to appeal. In the instant case, the motion was denied and thus does not warrant any further review on appeal. As was noted above, the defendant in Thornton was the actual owner of the property and had himself taken the steps to evidence his expectation of privacy. The Petitioner in the instant case had taken no such steps.

The third case cited by the Petitioner is Oliver v. United States, ___ U.S. ___, 103 S.Ct. 812 (1983). In that case, detectives drove past the defendant's residence

for approximately three quarters of a mile to a barn. At that point, the detectives were mistaken for hunters and were specifically advised to leave the premises. The officers ignored the warning and continued to cross the property. There was a private road blocked by a locked gate with a "no trespassing" sign posted on the gate. This was the fourth such sign that had been seen by the officers while crossing the farm. Two officers then slipped through a hole in the gate and continued on foot for another quarter of a mile across the farm. United States v. Oliver, 657 F.2d 85 (6th Cir. 1981).

In that case, the panel of the Sixth Circuit initially concluded that the expectation of privacy was

objectively reasonable based on the facts of that case. Subsequently, the Sixth Circuit Court of Appeals considered the case en banc. That court examined the facts of the case in light of Katz v. United States, supra. The court found that the general principles for the Fourth Amendment did not protect an open field of marijuana. The court concluded that the Fourth Amendment would protect a person in a house built in an open field, but not the field itself. Therefore, the en banc decision concluded that there was no Fourth Amendment violation. United States v. Oliver, 686 F.2d 356 (6th Cir. 1982) (en banc).

The court in that case clearly concluded that no set of facts would

ever serve to find a reasonable expectation of privacy in an open field. This was not the conclusion of the Court of Appeals of Georgia. The court only found that the field was outside the curtilage of the house, and that therefore, the Petitioner could not have a reasonable expectation of privacy in that field. Again, it should be noted that the Petitioner did not actually own the property searched. Had the field been closer to the residence, the court could have concluded that the Petitioner might have had a reasonable expectation of privacy in the field, but as the field was located some distance from the Petitioner's trailer, and the property on which it was located was owned by another, the

court therefore properly found that the Petitioner had no expectation of privacy in that field.

Respondent submits that the Georgia Court of Appeals properly applied the criteria for determining standing as set forth by this Court in Rakus v. Illinois, supra, and in so deciding, found that no reasonable expectation of privacy existed as defined by Hester v. United States, and Katz v. United States. As the Court of Appeals correctly applied the decisions of this Court, no federal constitutional issue exists which would justify the granting of a writ of certiorari.

CONCLUSION

For all the above and foregoing reasons, Respondent respectfully requests that this Court deny the petition for a writ of certiorari filed on behalf of Petitioners, Steven M. Karlovich and Tammy R. Harms.

Respectfully submitted,

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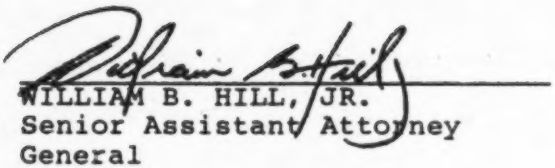

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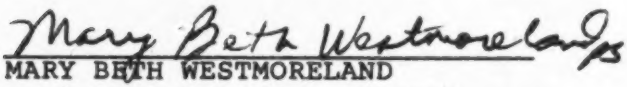

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CERTIFICATE OF SERVICE

I, Mary Beth Westmoreland, Attorney of Record for the Respondent and a member of the Bar of the Supreme Court of the United States hereby certify that in accordance with the rules of the Supreme Court of the United States I have this day served three true and correct copies of this Brief for the Respondent in opposition upon the Petitioners' attorney by depositing a copy of this brief in the United States mail with proper address and adequate postage to:

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This 25th day of March, 1984.

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